

**COMMENTS OF THE DIVISION OF THE RATEPAYER ADVOCATE,
STATE OF NEW JERSEY**

Non-Discrimination

Video Programming Providers

The rules of market entry must be equivalent for both telephone companies and cable operators. (5) Both industries should have the option of providing video services through the OVS model. (5) A level regulatory field is necessary to bolster competition. (5)

The Commission must recognize the sanctity of the cable franchise agreement through the end of any remaining franchise terms. (6) Cable operators must cooperate with local communities to develop mutually agreeable contracts to service those communities. (6)

The FCC should consider an enrollment period, with carriage applications submitted for review at the state level. (6)

Title VI Obligations

PEG, Leased Access

OVS operators should dedicate PEG access channels in sufficient numbers to meet community needs and interests. (2) There must be assurances, under the OVS regulatory scheme, that PEG access programming remains available to the public and that sufficient resources remain available for public access operations. (2)

Adequate information regarding PEG access must be made available to OVS subscribers, although the precise means may be left to the operator. (3) Where PEG access channels are functioning in the OVS service area, the RPA supports a requirement that the OVS operator interconnect to such programming feeds. (4) The Commission should permit sharing PEG expenses, duties, training and facilities at the local level. (4)

Other

In instances of disputes, settlements should be achieved utilizing alternative dispute resolution procedures at the state or local level. (4) The franchise authority should retain the right to file a complaint with the FCC for an OVS operator's violation of Section 653(c). (4)

COMMENTS OF CITY OF DENVER

Non-Discrimination

Video Programming Providers

Cable operators should not be allowed to convert their systems into OVS. (7)

Channel Capacity

Capacity should be stipulated in terms of bandwidth, not in terms of channels. (9)

Title VI Obligations

PEG, Leased Access, Must-Carry

OVS operator should provide PEG capacity that is equivalent to that provided by incumbent cable operators. (4) TCI provides support for PEG services beyond mere channel capacity. (2) Simple interconnection is not enough. (4) Sharing arrangements will result in lower PEG quality. (5) PEG is only facilitated if the OVS operator's requirements are consistent with those of the incumbent cable operator. (5) Rules should enable PEG programmers to telecast their services on the same channel for the OVS system as for the cable system. (6) PEG should be provided to all subscribers regardless of the other channels they receive. (6)

Other

Local governments must have a role in the OVS certification process. (8) Certain information should be filed locally, including documentation regarding PEG compliance. (8)

Technical considerations should not prohibit access for existing PEG services nor inhibit development of future services. (9)

FCC's emergency alert system should also apply to OVS. (9-10)

COMMENTS OF NEW JERSEY BOARD OF UTILITIES

Non-Discrimination

Video Programming Providers

Incumbent cable operators should not be allowed to operate OVS until it faces real competition. (2) Plain language of the statute and congressional intent support this interpretation. (2) There is a real difference between "offering video programming" and "provide cable service." (3) There are no significant benefits to allowing cable company to operate OVS. (4-5) Likely result of allowing incumbent cable operators to operate OVS would be to allow them to evade all regulation, which will stifle new entry. (6)

If FCC determines that cable operators should be allowed to operate OVS, it should be on the condition that the cable operator faces effective competition in their own service area. (8) Concern otherwise about effect on municipal franchising process. (8)

Title VI Obligations

OVS operator should be required to duplicate PEG obligations of incumbent cable operators by interconnection, cost sharing, and provision of PEG channels to all subscribers. (10) Most cable systems in New Jersey serve more than one franchise area. (11) It would be beneficial to require OVS operator to interconnect with the cable operator to provide comparable PEG access. (11) OVS operator should be required to share costs of complying with the PEG requirement. (12)

**COMMENTS OF
GROUP W SATELLITE COMMUNICATIONS**

Non-Discrimination

Channel Capacity and Channel Sharing

The shared use of video channels by multiple programming distributors can promote efficiency by effectively increasing the channel capacity of OVS operations. (2) However, such use must be subject to regulations that preserve efficiency, while prohibiting the use of channel sharing as a means for anti-competitive or unfair behavior. (2)

Program vendors must be free to grant or to deny permission for the placement of their product on shared channels. (3) The FCC must ensure that OVS operators and their affiliated programming distributors cannot use channel sharing agreements with unaffiliated programming distributors as a pretext for denying access to the shared channel's programming. (4) To prevent an anti-competitive result, the FCC should expressly preclude the use of channel sharing agreements or arrangements as a pretext for wrongful market exclusion or discrimination. (4)

REPLY COMMENTS OF VIACOM INC.

Non-Discrimination

Video Programming Providers

General prescriptive rules for nondiscrimination should be supplemented with "safe harbor" examples of practices deemed presumptively fair. (2) OVS-affiliated packagers should be permitted wide latitude to put together program packages. (3) OVS-affiliated packagers should not be forced to relinquish capacity where subsequent demand arises. (4)

Cable operators should be permitted to become OVS operators, but they should not be allowed to take up capacity on a competitor's system. (5) The Commission's rules must safeguard against the discriminatory use of menus and navigational devices. (9)

Channel Capacity

OVS operators should not have the unfettered ability to take all analog capacity for their affiliated programmers and offer only digital capacity to disfavored programmers. (4) There should not be a distinction between rates for analog and digital capacity if such a distinction were used to discriminate between programmers. (7)

Channel Sharing

Shared channels should not count toward an OVS operator's statutory cap on use of system capacity. (4) OVS operators should not be permitted to leverage their role as administrator of channel sharing to extract unreasonable licenses for unaffiliated program service. (8)

REPLY COMMENTS OF RESIDENTIAL COMMUNICATIONS NETWORK, INC.

RCN comments specifically on the rules proposed by the Joint LEC Commenters.

Non-Discrimination

Video Programming Providers

OVS operators should have broad flexibility to enter the video distribution marketplace. (2) The Commission should ensure that local authorities impose no more onerous restrictions on the use of the public rights-of-way on competitive LECs than they do on incumbents. (4)

The Commission should enforce its program access rules in the context of OVS. (4) OVS operators should be permitted to distinguish between video programmers based on their financial stability and creditworthiness through the use of different terms and conditions or special credit requirements or payment guarantees, as long as it is not unreasonable or discriminatory. (5) Video programmers should not be required to disclose their proposed programming. (6)

Channel Capacity

OVS operators should be able to limit the capacity available to unaffiliated programmers to an amount no greater than the operator allocates to its own affiliates. (6) OVS operators cannot be limited in any way in the number of channels that they may select or market to subscribers as long as capacity on the system exceeds demand. (7)

Network Non-Duplication, Syndex

The sports, network, and syndication provisions should be applied to the entity that controls the programming. (4)

Other

No technical requirements should be imposed that would impede the ability of an independent programmer from access to the OVS network. (6) OVS operators should be permitted an opportunity to cure alleged violations as part of the dispute resolution process. (6)

REPLY COMMENTS OF U S WEST, INC.

Non-Discrimination

The Commission should not be swayed to impose pervasive OVS regulation. (4)

Video Programming Providers

Specifically references Rainbow: "one [video programmer] even asked the Commission to redefine the term 'affiliate.'" (2) There is no reason to grant TCI and Rainbow request to expand the definition of the term affiliate to include any financial or business relationships, by contract or otherwise, directly or indirectly, between the OVS operator and the video programming provider, except the carrier-user relationship. (10) This proposal goes too far because it would make practically every video programming provider carried on an OVS an affiliate of the OVS operator. (10)

OVS operators have no obligation to provide unregulated services such as billing, CPE, marketing, and promotional services on a nondiscriminatory basis. (9) For example, Rainbow states that OVS operators should be required to make available all equipment necessary to access the OVS platform. (9)

Had Congress intended to limit the ability of OVS operators to market jointly, it would have done so. (11) There is no basis on which to require incumbent LECs to provide only the name, address, and telephone number of the local cable operator and give no information about the LECs' own cable service. (11)

Separate Subsidiaries

No separate subsidiary is necessary for OVS. (5) TCI and Rainbow are wrong in their interpretation of the separate affiliate section of the 1996 Act. (6) BOCs are not required to provide video programming service through a separate affiliate. (6) Incidental interLATA services are exempted from the separate affiliate requirement and are expressly defined to include the provision of video programming. (6) TCI and Rainbow make no sense when they claim that "the actual provision of service to the public is not an incidental service." (6) The point is that interLATA transmissions are incidental to the provision of video programming service. (6)

Cost Allocation

Cost-based rates and tariff requirements would violate Congress's prohibition against Title II regulation for OVS. (7-8) Rather, OVS is a prime candidate for forbearance. (8)

Other

OVS operators should not have to show at certification evidence of specific authorization from each local government for use of its public rights-of-way. (12)

REPLY COMMENTS OF TELE-TV

Non-Discrimination

Video Programming Providers

OVS programming providers must have access to the core programming that viewers demand in order to compete with cable. (2) Program access rules do not guarantee such access because they do not extend to television broadcasters and other programmers that are not affiliated with cable operators. (3-4) OVS operators must have access to broadcast and cable programming. (5) Access to broadcast network programming is particularly essential given the increased incidence of network affiliations. (7-9) Cable-affiliated programmers have attempted to maneuver around program access rules. (12) For example, Rainbow "expressly acknowledges that it has adopted a policy of denying programming to 'its potential competitors on an open video system,'" in direct violation of Section 628 of the 1992 Cable Act and 47 C.F.R. §§ 76.1001 and 76.1002. (13)

Cable operators have no statutory right to OVS capacity because the Commission can limit such access through its ability to prescribe regulations pursuant to Section 653(a)(1). (15) Congress intended to ensure that cable and telephone networks developed separately to foster facilities-based competition. (17)

OVS operators and OVS programming providers must allow access to broadcast television signals on every menu they present to subscribers. (19) OVS programming providers must be free to offer the same types of navigation and menus as will be deployed by cable companies without being subject to non-discrimination obligations. (22)

**REPLY COMMENTS OF THE PUBLIC ACCESS CORPORATION
OF THE DISTRICT OF COLUMBIA**

Non-Discrimination

Video Programming Providers

The Commission should allow meaningful access to unaffiliated third parties by allowing reasonable rate regulations to keep access prices affordable. (1) The Commission should prohibit cable operators from becoming OVS operators. (1)

Title VI Obligations

PEG, Leased Access

The Commission should require OVS operators to match the PEG obligations of cable systems. (1-2)

REPLY COMMENTS OF CITY OF ANN ARBOR, MICHIGAN

Non-Discrimination

Video Programming Providers

The Commission should adopt non-discrimination provisions that ensure that all programmers will have truly open and affordable access to OVS and prevent OVS from becoming a cable system in disguise. (1) The Telecommunications Act of 1996 prevents cable operators from becoming OVS operators. (1)

Title VI Obligations

PEG, Leased Access

OVS operators must meet local community needs and interests. (1)

Other

The Commission's rules must acknowledge the property interest that localities have in public rights-of-way. (1) 2

**REPLY COMMENTS OF NORTHERN DAKOTA COUNTY
COMMUNITY TELEVISION**

Non-Discrimination

Video Programming Providers

The Commission should allow meaningful access to unaffiliated third parties by allowing reasonable rate regulations to keep access prices affordable. (1) The Commission should prohibit cable operators from becoming OVS operators. (1)

Title VI Obligations

PEG, Leased Access

The Commission should require OVS operators to match the PEG obligations of cable systems. (1)

REPLY COMMENTS OF THE CITY OF BOSTON

Non-Discrimination

Video Programming Providers

The Commission should adopt non-discrimination provisions that ensure that all programmers will have truly open and affordable access to OVS and prevent OVS from becoming a cable system in disguise. (1) The Telecommunications Act of 1996 prevents cable operators from becoming OVS operators. (1, 4) The Commission should also prevent cable operators from occupying capacity on open video systems. (3)

Title VI Obligations

PEG, Leased Access

OVS operators must meet local community needs and interests. (1) OVS operators should match cable PEG requirements or be forced to negotiate with the localities. (2)

Other

The Commission's rules must acknowledge the property interest that localities have in public rights-of-way. (1, 5)

REPLY COMMENTS OF GENERAL SERVICES ADMINISTRATION

Cost Allocation

Telephone ratepayers should not be forced to subsidize the provision of video programming by the LECs. (3) GSA supports the modification of Part 64 to provide an effective safeguard against cross-subsidization. (4) Part 64 should be modified in a separate proceeding. (5) LECs must modify their procedures to comply with Part 64 as modified prior to certification. (5) LECs should be required to classify all OVS costs as unregulated. (5-6)

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

Non-Discrimination

Congress intended a specific regulatory framework for OVS. (5)

Separate Subsidiaries

The Commission should require separate subsidiaries. (9)

Cost Allocation

The video transport market is not competitive, so the Commission should ensure that rates are just and reasonable. (4) LECs have the incentive to shift the recovery of costs onto less competitive services. (7) This can occur even under a price cap regime either if base rates are above competitive rates or if actual productivity exceeds the productivity index. (8) The Commission should require proper cost allocation prior to certification and the submission of unbundled and cost-causative tariffs as a condition for certification. (9) In addition, the Commission should require OVS operators to make their contracts available for public inspection. (9)

REPLY COMMENTS OF ESPN, INC.

Non-Discrimination

Video Programming Providers

The Commission should clarify that program access should only apply to "capacity" or "access" contracts between the OVS operator and the video programming provider, not program license agreements between a programming network and either an OVS operator or a video programming provider. (2) The Commission should not adopt the NYNEX proposal to permit OVS operators to exclude from carriage programs for which a video programming provider has exclusive rights or favorable contract terms that preclude others from distributing the programming on its open video system. (3)

Channel Sharing/Marketing

ESPN reserves judgment whether joint marketing arrangements will bring the anticipated benefits. (5) Programming networks should be permitted to approve channel sharing and joint marketing arrangements. (4) Channel sharing should only be undertaken pursuant to the terms and conditions contained in program license agreements between programming networks and OVS operators or video programming providers. (5)

Title VI Obligations

Retransmission Consent

The 1996 Act is not intended to regulate the price or other consideration that a broadcast station or programming network can seek for its service, and these entities should therefore retain negotiating flexibility. (6)

REPLY COMMENTS OF NYNEX

Non-Discrimination

Congress directed the Commission to dispense with Title II regulation for OVS. (3) The series of Title II-like requirements that the commenters seek to have the Commission impose would result in the identical onerous regulatory regime that Congress instructed the Commission to avoid in light of the video dialtone experience. (5) Only regulatory flexibility will permit OVS to be operated and managed to attract customers. (6) The non-discrimination provisions of Section 653 were intended to assure that non-affiliated programmers have fair access to OVS. (7)

Video Programming Providers

General principles of non-discrimination should apply to the relationships between OVS operators and video programmers. (10) General non-discrimination requirements should also govern the relationship between programmers and broadcasters on OVS. (14) Video programmers on open video systems should not be able to obtain programming on a preferential or exclusive basis. (15) The Commission must allow an OVS operator to insist that those using its system have the ability to obtain programming on comparable, nondiscriminatory terms. (15)

Channel Capacity

OVS operators must remain free to develop their systems utilizing the best combination of analog and digital channel capacity plans that suits the needs of the demand for their services. (13)

Marketing

NYNEX disagrees with AT&T's suggestion that local telephone service and OVS should be unbundled. (9)

Title VI Obligations

Network Non-Duplication, Syndex

Unaffiliated programmers should be responsible for compliance with these provisions. (14)

Cost Accounting

The adoption of burdensome accounting and rate regulations such as subsidiary records, amendments to cost allocation manuals, and other reporting requirements would be contrary to Congress's directive to employ streamlined regulation for OVS. (7) Tariffs and detailed rate regulation are likewise unnecessary. (8, 11)

Other

States and localities should not be permitted to use the regulation of their rights-of-way in a manner that indirectly imposes franchise requirements on OVS operators. (17)

REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

The Commission should remain committed to its tentative conclusions that minimal regulation is appropriate. No new regulation should be imposed on companies that are new entrants into both video and telephony, such as MFS. No "Title II-like" regulation should be imposed, unlike what is proposed by TCI, Cablevision et al, and NCTA. (4)

Channel Capacity

Channel allocation should be negotiated between the OVS operator, programmers, and local franchising authorities. Demand for channels must be shown through evidence, such as deposits. (12) Channel capacity must include all reasonable capacity, including that which may be built out in a reasonable period of time. (13)

Separate Subsidiaries

"New entrants" like MFS cannot cross-subsidize. (8) NCTA, Continental, and TCI are incorrect to ask for separate subsidiaries. (10) TCI and Cablevision et al are wrong to ask for cost allocation rules. (10) None of these commenters' concerns relate to companies like MFS. (10)

Title VI Obligations

Local franchising authorities should not be given room to play with OVS. (13)

PEG, Leased Access

The FCC should preclude any duplication of PEG requirements. (14) Cable operators should be required to interconnect with existing PEG channel feeds to the OVS platform. (14)

Other

Carriage rates, terms, and conditions should be controlled by competition. (ii) Flexibility in service offerings is key. (8) OVS operators should not be required to carry programming of competitors. (iii) No new entry requirements should be imposed. (iii) Pre-certification requirements, which resemble Section 214 process, are not justified by the 1996 Act. (6) Only a minimal certification process should be imposed. (7)

The dispute resolution process should not provide opportunities for delay. (11) The Commission should adopt the CPUC and Bell Atlantic proposal that would require complainants to show clear and convincing evidence of discrimination. (11)

REPLY COMMENTS OF NATIONAL ASSOCIATION OF BROADCASTERS

Title VI Obligations

Network Non-Duplication, Syndex

Broadcasters should not be restricted in their rights to bargain for retransmission consent. (1) There is no legal basis for restricting their right to do so. (2) Nor is there a policy basis. (2) The telco position would "create an administrative nightmare," because it would require that all retransmission agreements conform with each other over the entire OVS service area. (3)

Moreover, the FCC does not have the authority to forbear from requiring that broadcasters be part of "basic" OVS (i.e., "must buy"). (4)

Other

All subscribers should be able to access local broadcast stations easily from any navigational menu. (4) Over-the-air channels should be positioned on the same "channel" as found over-the-air.

It is essential that any party interested in providing OVS give adequate prior notice to all video programmers. (1) Without proper notification, broadcasters will be unaware of their carriage rights. (5)

Finally, there should be no required showing of "actual and substantial commercial harm" as part of a prima facie case of discrimination. (6)

REPLY COMMENTS OF AT&T CORP.

Other

OVS operators should not be allowed to bundle competitive and non-competitive services because that would inhibit competition by allowing the non-competitive service provider to create bundled offerings that cannot be matched by others. (3)

REPLY COMMENTS OF NATIONAL LEAGUE OF CITIES, ET AL

The Commission should abide by four principles for OVS: (1) ensuring community needs are met under normal PEG and other Title VI requirements; (2) preventing discrimination by OVS operators against unaffiliated programmers; (3) increasing competition and new entrants by prohibiting cable operators from becoming OVS operators; and (4) preserving local control and management over rights-of-way.

Non-Discrimination

LECs can always be cable operators. OVS is something different and should be regulated accordingly. (iv) LECs' arguments to the contrary are disingenuous. (3) The FCC must adopt "strong" anti-discrimination rules. (vi) Requests for regulatory flexibility are merely veiled pleas for a competitive advantage. (12) Specific rules must enable independent programmers to use capacity readily. (25)

Video Programming Providers

The FCC should ensure that OVS is open to independent video programming providers. (iv) The LECs will exclude independent programmers if the FCC doesn't prevent them from doing so. (6) The video dialtone experience suggests LECs can and will discriminate, see Cablevision, CCTA, and TCI. (7) Common carriage concepts must apply to the extent necessary to achieve OVS objectives. (23) OVS rules must require uniform carriage rates and public disclosure of carriage rates and arrangements. (26-27)

Cable operators should not be allowed to "become OVS operators." (vii) The statutory language prohibits it, and it is against the policy of the 1996 Act. (33-35) There is no First Amendment right to become an OVS operator, contrary to what Cablevision and CCTA claim. (36) Moreover, cable operators who choose to do so would lose their current privileges to use the local rights-of-way by becoming OVS operators. (35).

Title VI Obligations

PEG, Leased Access

OVS operators cannot be allowed to avoid PEG obligations. (vi) The 1996 Act demands that PEG obligations match those of cable operators. (29) These obligations extend to channel capacity, facilities, and equipment. (26) Local PEG channels must be available to all subscribers in each franchise area and develop along with those of the competing cable operators. (31-32)

OVS certification gives no access to local rights-of-way. (vii) There is no preemption or substitution of this requirement of state and local laws.

Other

Since the FCC must act quickly on certifications, LECs must be required to "do their homework" before filing. (v) Certification review must be by a checklist, which means a "letter perfect" standard would not be inappropriate. Cf. TCI. (14)

Detailed rules for the complaint process should be required. (v) No process will work without standards, rules, and real relief. (16) The OVS operator must have the burden of proof in any such proceeding. (19)

**CONSOLIDATED REPLY COMMENTS OF
CITY OF PORTLAND, OR
ORANGE COUNTY, CA
CITY OF SANTA ANNA, CA
DISTRICT OF COLUMBIA TV
and MULTNOMAH COMMUNITY TELEVISION**

(SEPARATELY FILED, SUMMARIZED JOINTLY)

All commenters support National League of Cities initial comments. Moreover, they add:

PEG access is important and the FCC must ensure that it continues to meet local needs. (Portland) (Santa Anna)

PEG must be implemented so that OVS responsibilities match that of cable. Platform access should be reasonably priced to permit independents to utilize the system. (Multnomah)

REPLY COMMENTS OF MICHIGAN, ILLINOIS and TEXAS COMMUNITIES

The commenters strongly support the National League of Cities and its four governing principles. (4)

Non-Discrimination

Rules should require public disclosure of contracts between OVS operators and every programmer. (5) The commenters favorably reference TCI's definition of "affiliate." (6)

Video Programming Providers

Independent video programming providers should be given latitude to flourish. (3) Procedures for access should be transparent and meaningful. (7-8)

Title VI Obligations

PEG, Leased Access

OVS operators must be required to match or negotiate PEG obligations. (29) This must be made part of the certification process. (30) Regional PEG should not be contemplated or allowed. (31) As TCI points out, cable systems serve multiple franchise areas already. (34)

Cost Allocation

Costs should be appropriately allocated between telephone and OVS to prevent cross-subsidization. (13) Rates must be part of a "rate structure," with a most-favored nation clause, and not negotiated on a case-by-case basis. (8)

Other

Non-LECs should not be allowed to become OVS operators. (14) The language, intent, and reasoning of the 1996 Act would be subverted if cable operators were allowed to offer OVS. (16)

The certification process must require local sign-off. (17) In addition, local governments must retain control over the use of public rights-of-way. (19) Work in rights-of-way can lead to accidents and major claims (cites to TCI-related incident on Denver, March 20, 1995). (19)

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA

Non-Discrimination

The Commission should protect broadcast programming against discrimination vis-a-vis non-broadcast program sources. (ii)

The public interest will not be served if OVS operators are able to foreclose unaffiliated competition. (i) The Commission should fulfill the Congressional goal of promoting both intermodal and intramodal competition by adopting rules to prevent discrimination with respect to channel allocation, channel position, channel sharing, rates for capacity, and the provision of information to subscribers. (i)

The Commission should establish clear and distinct OVS regulations that: 1) facilitate the development of multiple outlets for video programming, and 2) ensure that competitive advantages enjoyed by the OVS operators are the result of marketplace skills and program quality, not discrimination and artificial regulatory distinctions. (3)

MPAA urges the Commission to reject any discrimination among different MVPDs or programming vendors and, instead, to establish an effective complaint process for alleging discrimination. (8)

Channel Capacity

The Commission must provide sufficient incentives for OVS operators to build and expand capacity to meet the demand of non-affiliated MVPDs, and to make such capacity available on a non-discriminatory basis. (ii)

Channel Sharing

Any channels licensed by a programming vendor to more than one MVPD using OVS capacity must be given shared channel status, consistent with contractual rights and technical limitations.

In no case should the OVS operator be permitted to discriminate in favor of its affiliated MVPD with respect to how and which programming is selected for shared channels, which MVPDs and programming obtain more desirable analog channel positioning, and how capacity is allocated among competing MVPDs.

Title VI Obligations

PEG, Leased Access

MPAA disagrees with suggestions that the rate formulas for access to OVS capacity and for commercial leased access on a cable system should be linked. (9)